United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 28, 1998

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bekins Moving & Storage Company
Case 21-CA-32429 530-4850-6700

This case was submitted for advice on whether the successor Employer had a clear "plan to retain all" its predecessor's unit employees and, therefore, whether the Employer violated Section 8(a)(5) by unilaterally setting its own initial terms and conditions of employment.

FACTS

The predecessor employer, Bekins Moving & Storage (BMS), had a collective-bargaining agreement with the Union covering a unit of two warehousemen at its San Diego facility. That agreement expired by its terms on March 31, 1998.[1] In February or March BMS' general manager Lovejoy confirmed to Crampton, a unit employee and Union steward, rumors that BMS was going to be sold. In response to Crampton's concerns about maintaining his Union benefits and affiliation, Lovejoy said he wasn't against the employees being in the Union but that he did not know what the new owners' plans were. Lovejoy was retained as manager by the successor Employer.

In early May, Lovejoy informed the employees that BMS would be sold by the end of May or early June. Crampton states that Lovejoy indicated that he didn't see any real changes being made after the sale because BMS was making money, and that consequently the employees' jobs were not in jeopardy. Crampton states that Lovejoy then said that he planned to keep Crampton and Herridge, the two unit employees, after the sale. The other unit employee, Herridge, has indicated orally to the Region that he did

[1] All dates are in 1998.

not hear any discussion about employee job security, and that he felt unsure enough about his job security that he attempted to use as much vacation time as possible before the sale.

The sale to the Employer, which is owned by a former executive of BMS, took longer than initially expected. On June 26, BMS regional manager Black assembled both the unit and nonunit employees and informed the employees that they had to complete new applications, sign books of Employer rules, sign "at will" employment agreements, and return all the completed papers by June 30 if they "wished to remain as employees." Black then outlined several changes in wages and benefits the Employer would offer its employees; some of those terms, especially in the area of benefits, were different than those enjoyed by unit employees under BMS.

Employee Crampton called the Union business agent and asked what he and Herridge should do with respect to the new terms and conditions. The business agent instructed the employees to complete the forms and remain employed, explaining that it was the Union's position that the new Employer would be obligated to bargain with the Union. Both Crampton and Herridge did as instructed. On July 1, all of the former BMS employees, including the two unit employees, were hired by the successor Employer under the new terms and conditions of employment. By letter dated July 2, the Union requested bargaining with the Employer and reminded the Employer of its "obligation to maintain all working conditions."

ACTION

We conclude that there is sufficient evidence that the Employer had a "plan to retain all" the unit employees before it announced that it was offering new terms and conditions of employment, thereby rendering its subsequently announced and implemented unilateral changes in those terms unlawful. Accordingly, a Section 8(a)(5) unilateral change complaint should issue, absent settlement.[2]

[2] According to the Region, "the Union would further appear to maintain an alternate position that, even if the Employer could establish initial terms and conditions of

A successor employer normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, the Supreme Court in NLRB v. Burns Security Services,[3] enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In Canteen Company,[4] the Board applied this "perfectly clear" exception to hold that:

> when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted.] Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board plurality in Canteen relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and

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employment, it has failed and refused to engage in meaningful bargaining since August 14." That allegation is not contained in the charge, is not specifically set forth as an issue submitted for advice and, in any event, the Region has determined that the evidence is insufficient to establish the Employer has refused, or is continuing to refuse, to bargain in good faith over changes to its initially set terms.

[3] 406 U.S. 272, 294-95 (1972).

[4] 317 NLRB 1052, 1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

conditions of employment."[5] Thus, in applying the "perfectly clear" exception, the Board scrutinizes not only the successor's plans regarding the hiring of the predecessor's employees but also any expression of its intentions concerning existing terms and conditions of employment. In Canteen and other "perfectly clear" cases, a bargaining obligation has been imposed under the Burns exception based upon the successor's silence as to changing or continuing the existing working conditions at the time it indicated it would be hiring the predecessor's employees.[6]

We conclude that the instant case falls within the Burns "perfectly clear" exception and that the Employer's

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[5] Id. at 1052.

[6] See, e.g., Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enf. denied in relevant part *sub nom*. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees where the employer made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment; 8(a)(5) violation found when it later submitted an employment contract with unilaterally changed terms and conditions of employment); Fremont Ford, 289 NLRB 1290, 1296-1297 (1988) (initial bargaining obligation imposed under "perfectly clear" exception where new employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it would retain a majority of the predecessor's employees and did not announce significant changes in initial terms and conditions of employment until it conducted hiring interviews). In Canteen, 317 NLRB at 1053, the Board distinguished its dismissal of the complaint in Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), where the employer was not a "perfectly clear" successor because representatives explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor.

obligation to consult and bargain with the Union over desired changes in unit employees' working conditions therefore attached in early May, when manager Lovejoy stated that he planned to keep the employees after the sale. The Region has informed us that it has determined that when Lovejoy made this statement, he was an agent of the successor Employer.[7] We conclude that Lovejoy's statement, [*FOIA Exemption* 7(D) ,] constitutes adequate evidence of the Employer's plan to retain all of the unit employees. Unit employee Herridge's telephonic assertion that he did not recall any such discussion [does not render [*FOIA Exemption* 7(D)], and may only mean that Crampton and Herridge heard or remembered different parts of the conversation.[8] Lovejoy's statement about retaining the employees as recalled by Crampton is consistent with his concurrent statements that he did not foresee any changes being made after the sale because BMS was making money, and that the employees' jobs were not in jeopardy as a consequence. Since neither Lovejoy at that time, nor any other Employer agent until June 26, made any mention of initial Employer terms and conditions of employment that would vary from BMS' existing terms and conditions, we conclude that the Employer, as a successor to BMS with a clear "plan to retain all" unit employees, thereafter violated Section 8(a)(5) by unilaterally announcing and implementing changed terms and conditions of employment.

[*FOIA Exemptions* 2 and 5

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[7] See Lemay Caring Center, 280 NLRB 60, 65-67 (1986), enfd. mem. 815 F.2d 711 (8th Cir. 1986) (8(a)(1) statements of predecessor employer's supervisor prior to takeover binding on successor where the supervisor was retained by successor).

[8] Perhaps Herridge's uncertainty about his job security was related to Herridge's "motivational problems" [*FOIA Exemption* 7(D) .]

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B.J.K.

[9] See December 20, 1994 Appeals Minute in Oakwood Care Center, 1-CA-31870, wherein the General Counsel has decided to challenge the holding in Spruce Up Corp., *supra*.